

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

DUBLIN DIVISION

FILED  
U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF GEORGIA

2010 SEP 21 PM 9:11

CLERK L. Elbert  
SO. DIST. OF GA.

THOMAS MELCHOR GOMEZ,

Plaintiff,

v.

WALT WELLS, Warden,

Defendant.

CV 310-012

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**MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

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Plaintiff, an inmate at the McRae Correctional Facility ("MCF"), in McRae, Georgia, filed the above-captioned case pursuant to 42 U.S.C. § 1983.<sup>1</sup> Because Plaintiff's complaint was filed *in forma pauperis*, it must be screened to protect potential defendants. Phillips v. Mashburn, 746 F.2d 782, 785 (11th Cir. 1984). Pleadings drafted by *pro se* litigants must be liberally construed, Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (*per curiam*), but the Court may dismiss a complaint, or any part thereof, that is frivolous or malicious or that fails to state a claim upon which relief may be granted. 28 U.S.C. §§ 1915(e) & 1915A.

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<sup>1</sup>Plaintiff initially filed the above-captioned case under 42 U.S.C. § 1983. Section 1983, however, only authorizes claims alleging the deprivation of constitutional rights by persons acting under color of state law. The authority to maintain custody of federal prisoners is one created by federal law and reserved solely to the federal government. Thus, relief under § 1983 is not available to Plaintiff. See, e.g., Sarro v. Cornell Corr., Inc., 248 F. Supp.2d 52, 64 (D. R.I. 2003). Accordingly, the Court will construe Plaintiff's complaint broadly as an attempt to state a claim under Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).

## **I. BACKGROUND**

Plaintiff names Warden Walt Wells as the sole defendant in this action. (Doc. no. 1, p. 1.) Plaintiff alleges that Defendant has subjected him to cruel and unusual punishment in violation of his Eighth Amendment rights. (Id. at 5.) The only factual basis for this claim asserted by Plaintiff in his complaint is that, as an inmate at MCF, the only seating available to him is “cold and low iron seats.” (Id.) According to Plaintiff, these iron seats amount to “a form of torture” and have caused him serious physical injury. (Id.) Plaintiff seeks relief in the form of compensatory monetary damages and “the option of gaining” a reduction in his sentence. (Id. at 6.)

On December 29, 2009, Plaintiff submitted a grievance to Defendant regarding, among other things, the issues that are the subject of his complaint in this case. (Id. at 7.) On January 8, 2010, his grievance was denied. (Id. at 12.) Plaintiff did not appeal the denial of his grievance because he claims that “[MCF] is only functioning in the interest of profit. Whenever the interest of financial gain exceeds the interest of justice, there can be no justice.” (Id. at 4.)

## **II. DISCUSSION**

Plaintiff’s claim must be dismissed because of his failure to exhaust his administrative remedies.

Section 1997e(a) of the Prison Litigation Reform Act (“PLRA”), Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321 (1996), provides that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison or other correctional facility until such administrative remedies

as are available are exhausted.” 42 U.S.C. § 1997e(a). The PLRA’s mandatory exhaustion requirement applies to all federal claims brought by any inmate. Porter v. Nussle, 534 U.S. 516, 520 (2002). Moreover, the Court does not have discretion to waive the requirement, even if it can be shown that the grievance process is futile or inadequate. Alexander v. Hawk, 159 F.3d 1321, 1325-26 (11th Cir. 1998).

Furthermore, the PLRA also “requires proper exhaustion.” Woodford v. Ngo, 548 U.S. 81, 93 (2006). In order to properly exhaust his claims, a prisoner must “us[e] all steps” in the administrative process; he must also comply with any administrative “deadlines and other critical procedural rules” along the way. Id. at 90 (internal quotation omitted). If a prisoner fails to complete the administrative process or falls short of compliance with procedural rules governing prisoner grievances, he procedurally defaults his claims. Johnson v. Meadows, 418 F.3d 1152, 1159 (11th Cir. 2005), *cert. denied*, 548 U.S. 925 (2006).

Also, because exhaustion of administrative remedies is a “precondition” to filing an action in federal court, the Eleventh Circuit requires prisoners to complete the administrative process *before* initiating suit. Higginbottom v. Carter, 223 F.3d 1259, 1261 (11th Cir. 2000) (*per curiam*); *see also* Miller v. Tanner, 196 F.3d 1190, 1193 (11th Cir. 1999). Other federal circuits have similarly held that the PLRA does not allow a plaintiff to exhaust administrative remedies while his case is pending. *See* McKinney v. Carey, 311 F.3d 1198, 1200 (9th Cir. 2002); Medina-Claudio v. Rodriguez-Mateo, 292 F.3d 31, 36 (1st Cir. 2002); Neal v. Goord, 267 F.3d 116, 121-22 (2d Cir. 2001); Jackson v. Dist. of Columbia, 254 F.3d 262, 269 (D.C. Cir. 2001); Freeman v. Francis, 196 F.3d 641, 645 (6th Cir. 1999); Perez v. Wisconsin Dep’t of Corr., 182 F.3d 532, 538 (7th Cir. 1999). Finally, under the PLRA, the Court has no

discretion to inquire into whether administrative remedies are “plain, speedy, [or] effective.” Porter, 534 U.S. at 524; see also Alexander, 159 F.3d at 1326. Rather, under the PLRA’s “strict exhaustion” requirement, administrative remedies are deemed “available” whenever ““there is the possibility of at least some kind of relief.”” Johnson, 418 F.3d at 1155, 1156.

Here, Plaintiff admits that he has failed to complete the exhaustion process concerning the claim set forth in his complaint. He states that he did not appeal the denial of his initial grievance because MCF’s interest in generating profits “exceeds the interest of justice.” (Doc. no. 1, p. 4.) However, Plaintiff’s assertion of MCF’s allegedly ineffective grievance procedures do not exempt him from the requirement that he exhaust every step of his administrative remedies. See Alexander, 159 F.3d at 1325-26 (holding that courts do not have authority to waive grievance procedures even if they are ineffective or futile). As exhaustion of administrative remedies is a “precondition” to filing an action in federal court, Plaintiff had to complete the administrative process *before* initiating this suit; thus, his Eighth Amendment claim—the sole claim set forth in his complaint—should be dismissed without prejudice.<sup>2</sup>

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<sup>2</sup>The Court recognizes that the Supreme Court recently held that under the PLRA, exhaustion of administrative remedies is an affirmative defense. Jones v. Bock, 549 U.S. 199, 215 (2007). However, if the allegations in the complaint, taken as true, demonstrate that a prisoner’s claims are barred by an affirmative defense, the complaint is subject to dismissal for failure to state a claim upon which relief can be granted. Id. at 14; see also Clark v. Georgia Bd. of Pardons and Paroles, 915 F.2d 636, 640-41 (11th Cir. 1990) (explaining that district court may dismiss prisoner’s complaint “if [it] sees that an affirmative defense would defeat the action,” including the prisoner’s failure to exhaust “alternative remedies”). Therefore, because it is clear from the face of Plaintiff’s complaint that he failed to exhaust his administrative remedies, the Court can properly recommend that Plaintiff’s complaint be dismissed. See Anderson v. Donald, Civil Case No. 06-16322 (11th Cir. Jan. 8, 2008) (finding that the district court properly dismissed the plaintiff’s complaint because the allegations in the complaint sufficed to establish that Plaintiff failed to exhaust his

### III. CONCLUSION

In sum, the Court **REPORTS** and **RECOMMENDS** that Plaintiff's complaint be **DISMISSED** without prejudice for failure to exhaust administrative remedies, and that this civil action be **CLOSED**.

SO REPORTED and RECOMMENDED this 24<sup>th</sup> day of September, 2010, at Augusta, Georgia.

  
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W. LEON BARFIELD  
UNITED STATES MAGISTRATE JUDGE

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administrative remedies).